IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 3 OF 2005

State
through Public Prosecutor,
High Court of Bombay at
Panaji, Panaji. ... Appellant

versus

Suresh s/o Basappa Honegeri,
R/o Tal: Koppal,
Dist: Koppal, Village Vasur,
P.O. Chilakmoki, Karnataka,
Presently r/o Bamon Wado,
Candolim, Bardez, Goa. ... Respondent

Ms. W. Coutinho, Public Prosecutor for the State/Appellant.

Mr. D. Pangam, Advocate under the Legal Aid Scheme for the Respondent.

CORAM : N. A. BRITTO, J.

DATE : 19TH AUGUST,2006.

ORAL JUDGMENT

This is State's appeal against the acquittal of the accused under Section 376 r/w Section 511 I.P.C., by Order

dated 23-6-2004 of the learned Assistant Sessions Judge, Panaji.

2. Upon a complaint filed by Bismilla Shaikh/PW1 on 29-9-2003 at about 11.00 a.m., as regards an incident which allegedly took place on 27-9-2003 at about 7.30 a.m., the accused was prosecuted with the allegation that the accused had attempted to commit rape upon the victim/PW2 in one of the huts belonging to Annuncecao/PW7.

3. The family of Bismilla/PW1 was residing and at a distance of about 2 meters from the hut of the accused who was residing along with his friends and brothers.

4. The incident of alleged attempt to rape took place between 7.30 hours and 8.15 hours on 27-9-2003 and after Bismilla/PW1 filed a complaint on 29-9-2003, the victim/PW2 was medically examined by Dr. Sapeco/PW6. After medical examination the offence was registered against the accused. The accused was also examined by Dr. Sapeco/PW6. The statement of the victim/PW2 came to be recorded only on 4-10-2003 and thereafter chargesheet was filed.

5. In the course of the trial, the prosecution examined 8 witnesses including Police Inspector Shri Madkaikar and after considering the evidence of the said witnesses the learned Assistant Sessions Judge proceeded to give benefit of doubt to the accused and acquit him from the offence charged under Section 376 r/w Section 511 I.P.C.

6. There appears to be nothing positive in the case of the prosecution. The victim/PW2 is the daughter of Bismilla/PW1 and one Allabaksh to whom she was earlier married but at the time of the incident Bismilla/PW1 was residing with Kumar Agadi/PW3. It is doubtful whether Bismilla/PW1 was married for the second time to Kumar/PW3 since in her evidence Bismilla/PW1 has made conflicting statements to that effect. The victim/PW2 stated in her evidence that she knew the accused as she had seen him in his house which is close to her house and on the date of the incident, when she was in the house of the accused, the accused put his hand on her private part and thereafter removed her knicker and kept it aside and removed his knicker and then tried to put his penis in

her private part. The victim/PW2 was so well trained by her mother Bismilla/PW1 that she demonstrated before the trial Court as to how the incident took place so much so that the victim/PW2 acted the incident by sleeping on the floor and showed by gestures how the accused had tried to put his penis into her private part, and, due to which she stated that her private part started burning and she started crying and therefater she went home and informed about the incident to her mother. However, in cross-examination she, as a child she was, admitted that she was tutored by her mother to depose in the fashion in which she did. At the same time she also stated that she was tutored by the accused. She was asked as to which name of her father she had given to the Police but she remained quite. Ultimately when she was asked as to her father's name who was presently residing with her, she stated that his name was Allabaksh. One fails to understand as to how the victim/PW2, as a child she was, could have known the name of her father as Allabaksh at a time when Bismilla/PW1was residing with Kumar/PW3 as her husband. The evidence of the victim/PW2 shows that she deposed before the Court on being tutored by her mother and as such the learned trial Court was

fully justified in not placing any reliance on her evidence.

7. Bismilla/PW1 stated before the Court that on 27-9-2003 at about 7.30 a.m., her daughter, the victim/PW2 who was 3 years of age had gone to play in the room of the accused, and at about 8.15 a.m. she came home crying and she pointed out to her that she was getting pain in her private part and that her private part was burning and requested her to remove her knicker which she removed and on verifying the same she found some sticky material on it and when she asked the victim/PW2, the reason of crying, she told her that the accused had slept over her by taking her legs in between his legs and by removing his pant and underwear he had tried to interfere with her private part. The silence of Bismilla/PW1 in not reporting about the incident to anyone including her neighbours, is rather deafening, if I may use that expression. According to her, her husband Kumar/PW3 had left for work earlier and did not come home that night and he came home on the next day i.e. on 28-9-2003. As regards the aforesaid statement, the victim/PW2 had stated that her father had come home on the night of the incident. Initially she stated that when her husband came home on

28-9-2003 she had narrated the incident to him and since it was late and there was no bus for them to go to Calangute Police Station they did not lodge the complaint on that night and lodged the complaint on 29-9-2003. However, in further cross-examination she stated that Kumar/PW3 had come home drunk on 28-9-2003 and therefore they did not go to lodge the complaint on that night. She also conceded that on that night Kumar/PW3 was heavily drunk and he could not even walk properly. Bismilla/PW1 further stated that although she goes to work and was supposed to go to work on the date of incident, she did not go to work on that day because of the incident and further stated that on the next day she left the victim/PW2 alone in the room and went to work. This conduct of Bismilla/PW1 has been rightly taken note of by the learned Assistant Session Judge. The learned Assistant Session Judge observed that the least Bismilla/PW1 could have done is to request her other neighbours with whom she otherwise used to keep the victim/PW2 whenever she went to work, to look after the victim/PW2 and this was more so because she had made it clear in her evidence that whenever she and her husband went to work, they used to request the neighbours to look after the

victim/PW2 by further saying that she used to trust her neighbours though she was unable to give the names of those neighbours. The conduct of Bismilla/PW1 is not free from doubt. In case there was an incident on 27-9-2003 wherein her daughter was sought to be raped, Bismilla/PW1 would not have left her daughter alone in the room and gone to work. Bismilla/PW1 also stated that after the incident was reported to her she did not go to the room of the accused since the accused was sleeping. In another breath she stated that after the incident she did not see the accused and though she had gone to see him, she found the door of his room latched from inside and though she had pushed it, it did not open. The learned Assistant Sessions Judge rightly noted that what transpired from the said evidence is that Bismilla/PW1 did not at all see the accused in the room even after the alleged incident and since the accused used to reside in his room with his brother and friends it was not clear actually who was in the room when Bismilla/PW1 went there and pushed the door which of course did not open. Bismilla/PW1 was not at all consistent in her evidence and therefore the learned Assistant Sessions Judge rightly disbelieved her evidence. If at all the statement of the

victim/PW2 was recorded on 3-10-2003 and was not recorded on 29-9-2003 upon her return from the Police Station it is presumably because the victim/PW2 was not made ready to give a statement as regards the incident. As far as the medical evidence goes there is nothing positive in the case of the prosecution. Dr. Sapeco/PW6 found the peritoneum was redenned of the victim/PW2 with glistening appearance. It is stated in the report prepared by him-Exh.20 that the child resisted the examination and therefore per vaginal examination was not done. Yet, Dr. Sapeco/PW6 stated that physical vaginal examination was suggestive of an attempted sexual intercourse. Admittedly, there was neither swelling or an inflammation of the peritoneum. In cross-examination, Dr. Sapeco/PW6 stated that the redenning should have subsided within a period of 48 hours. Admittedly, the victim/PW2 was medically examined much beyond 48 hours and if that is so it is difficult to believe that the said redenning had taken place at the time alleged on 27-9-2003. Dr. Sapeco/PW6 did not give any basis for his conclusion why the said redenning was suggestive of an attempted sexual intercourse. There is nothing definite in the opinion given by Dr. Sapeco/PW6 to suggest that the said

redenning was due to an attempted sexual intercourse. Although, Bismilla/PW1 stated that she had found the knicker of the victim/PW2 with sticky material, she stands falsified on the same by the report of the Central Forensic Science Laboratory, Hyderabad. The vaginal swabs, smear slides, urethral swabs, pubic hair, the underwear of the victim/PW2 and the accused have all been proved negative either for blood or for semen.

6. It was suggested to Bismilla/PW1 that a fortnight before the alleged incident there was a fight between Kumar/PW3 and the accused on account of the fact that Kumar/PW3 under influence of alcohol was creating disturbance and the accused had complained about it to the landlady a suggestion which Kumar/PW3 denied. However, the said denial was falsified by the victim/PW2 when she stated that few days prior to the incident there was a fight between the accused and her father and that her father always used to come home drunk and fight with the mother. It is not unknown that many a times parents retaliate on account of previous enmity by falsely making an allegation of rape. The evidence led by the prosecution was totally unreliable and the view taken by the

learned Assistant Sessions Judge was the only plausible view based on the evidence produced. Consequently, I find there is no merit in this appeal and therefore the same is hereby dismissed.

N. A. BRITTO, J.

RD.